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Issue Date: 23 December 2005

CASE NO.: 2003-LHC-01680
OWCP NO.: 01-156906

In the matter of:

MICHAEL LOE
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Peter A. Shavone, Esq., Warwick, Rhode Island, for the Claimant

Conrad Cutcliffe, Esq., Cutcliffe Glavin & Archetto, Providence, Rhode Island
for the Employer/Self Insured

DECISION AND ORDER DENYING BENEFITS

I. Statement of the Case

This matter arises from a claim for workers' compensation benefits filed by Michael Loe ("Claimant") against his employers, Electric Boat Corporation ("Electric Boat" or "EBC") and Senesco Inc. ("Senesco") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq*. ("LHWCA" or "Act"). After an informal conference before the District Director, Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. That hearing was held before the undersigned on October 24, 2003, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel and an appearance was made by counsel on behalf of EBC. There was no representative for Senesco as the Claimant represented that he had reached a settlement with Senesco that the parties would submit soon thereafter. Hearing Transcript ("TR") 5. The Claimant testified at the hearing and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-17, without objection from EBC. The

Employer's Exhibits were designated Respondent Exhibits ("RX") 1-13 and were admitted. TR 10-13.[1] The official documents in the file were admitted into evidence without objection as Administrative Law Judge Exhibits ("ALJX") 1-8. TR 13-14.[2] EBC and the Claimant have both filed briefs and the record is now closed.

II. Stipulations and Issues Presented

The Parties have stipulated to the following: (1) the Act applies to this claim; (2) if there was an injury, it occurred at Quonset Point, Rhode Island; (3) the Employer was timely notified of the injury; (4) the claim for benefits and the notice of controversion were timely filed; (5) the informal conference was conducted on March 19, 2003; and (6) the Claimant's average weekly wage at EBC was $520.59. TR 6-7.

The issues in dispute include: (1) whether the Claimant's 1993 settlement of claims against Electric Boat under the Rhode Island Workers' Compensation Act acts as collateral estoppel precluding this claim for alleged hearing loss; (2) whether the Claimant has a hearing loss caused by his employment at Electric Boat; (2) the nature and extent of any impairment. TR 7-9.

III. Findings of Fact and Conclusions of Law

A. Claimant's Testimony

The Claimant worked at Electric Boat's Quonset Point facility from 1972-1992 and then again for a short period from September 4, 2001 through September 19, 2001. TR 20. During both periods of employment at Electric Boat he was a shipfitter. TR 21. From 1972-1992, the Claimant's duties included tack welding, grinding, and fitting steel. TR 22. In performing these jobs, Claimant used tools, including grinders, welding torches, cranes and chain. TR 24. The Claimant testified that he worked alongside other tradesmen who welded, ground, and burned steel to fit submarines together. TR 22. The Claimant testified that during his initial period of employment from 1979 to 1992 there was a high level of noise in his work environment and that he never wore hearing protection, even though it was offered to him. TR 22, 26.

The Claimant next worked in maritime employment with Senesco as a fabricator for one year, from approximately July or August 1999 to September 2000. TR 30; EX 2 at 1; RX 5 at 1. As a fabricator, the Claimant assembled components to build a barge. TR 27. The Claimant testified that his duties in this position were very similar to his duties at EBC, as he was doing tack welding and grinding. TR 28. In addition, he laid out machinery, drilled holes in the floor, anchored objects, cleaned, painted, and did general maintenance work. *Id*. The Claimant stated that the noise level in

[1] The Claimant's objection to RX 9 was overruled.

[2] Between November 2003 and January 2004, the Claimant and Senesco settled the claim, and the two parties submitted a settlement pursuant to Section 8(i) of the Act. On January 26, 2004, a Decision and Order Approving Settlement was issued. Due to an administrative error, the Decision and Order Approving the Settlement with Senesco was construed as a resolution of the entire matter, including the claims against EBC. On November 28, 2005, the Claimant and EBC sent a joint letter inquiring about the status of the case, and the OALJ recognized a mistake that had been made and the matter was placed back on the docket for resolution.

this facility was high as well, although he believed EBC was somewhat louder. TR 29. The Claimant testified that he did not wear hearing protection at Senesco. TR 45.

During the first week of the Claimant's second period of employment at EBC in 2001, he was in welding school for approximately one hour per day, and fit plates together for the other seven hours per day. TR 37. During the second week, the Claimant was in the submarine production department. TR 37-38. In this department, employees weld, grind, gouge and fit pieces together. TR 38. The Claimant testified that he did not wear hearing protection during his short period of employment at Electric Boat in 2001, despite the fact that it was required. TR 26-27. The Claimant admitted however, that he would wear hearing protection when the company officials in charge of safety were near the Claimant. TR 26-27. Later in the hearing, however, the Claimant testified that no one ever informed him that he had to wear hearing protection. TR 38. The Claimant testified that he was terminated from his second period of employment at EBC in 2001 approximately two weeks after he started due to a mistake in his application, for which EBC felt the Claimant was attempting to deceive the company. TR 55.

The Claimant next testified about his hearing loss. He stated that prior to his employment at Senesco he did not have any complaints about his hearing, except that he had "clicking and hissing" in his ears. TR 30. He had hearing tests done as part of physical examinations prior to the commencement of his employment at both Senesco and his second stint at EBC. TR 31. Approximately six or eight months after his second period of employment with EBC ended, the Claimant sought treatment for hearing problems with Mary Kay Uchmanowicz, an audiologist. *Id.* In June 2002, the Claimant also saw Janet Sells, an audiologist retained by EBC. TR 34. The Claimant testified that he sought treatment for his hearing because his ears "constantly click and snap…they always hum. They change pitches constantly…I have problems hearing in a crowd of people…If any loud noise, a dog barking or anything like that, my ears just snap. They will not tolerate any loud noise." TR 36-37.

B. Medical Evidence

Medical evidence was submitted by both parties, in the form of depositions and medical records. The Claimant was examined by two audiologists, Dr. Mary Kay Uchmanowicz and Dr. Janet Sells. Both experts made their determinations of the Claimant's hearing loss in accordance with the Fifth Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* ("*Guides*"), which is the most current edition of the *Guides*, as required by Section 8(c)(13)(E) of the Act. 33 U.S.C. §908(c)(13)(E).

The Claimant was first examined by Dr. Mary Kay Uchmanowicz of Twin Rivers Hearing Health, Inc. on June 20, 2002. CX 3 at 5. Dr. Uchmanowicz holds a certificate of Clinical Competence in Audiology from the American Speech, Language, Hearing Association and is a Fellow of the American Academy of Audiology. CX 3 at 1. She is a licensed audiologist in Rhode Island and Massachusetts. *Id*. She holds a Master of Science Degree and a Doctorate in Audiology. *Id*. Dr. Uchmanowicz specializes in audiological testing and the fitting and sale of hearing aids, and she sells a substantial number of hearing aids during the year. CX 3 at 5.

Dr. Uchmanowicz took a case history from the Claimant, and performed a standard audiological evaluation, which included pure tone testing, bone conduction testing, speech recognition testing, impedance, acoustic reflexes, and a tinnitus evaluation. CX 3 at 5. At her deposition Dr. Uchmanowicz acknowledged that she had lost the Patient Information Form that

contained the Claimant's history. CX 2 at 6. Thus, the documentary record Dr. Umchamanowicz stated she relied upon in offering her opinion was not available during her deposition. She also admitted that she did not know whether the Claimant had worked in a noisy environment after his first period of employment at EBC ended in 1992. CX 2 at 6. Dr. Uchmanowicz was able to testify as to the Claimant's pre-employment audiogram with Senesco in 1999, which was submitted as CX 5. She testified that the results of this audiogram showed a "zero percent binaural impairment." CX 2 at 6.

Dr. Uchmanowicz testified that in addition to the Claimant's regular exposure to loud noise, there was one traumatic incident in particular "involving a pop to his right ear" that could have contributed to the Claimant's hearing loss. CX 2 at 8. Based on Dr. Uchmanowicz's records, the incident seems to have occurred during the Claimant's first period of employment at EBC sometime between 1979 and 1992. CX 1 at 1. Dr. Uchmanowicz explained the significance of this incident in this way: "noise-induced hearing loss can be caused…by hourly exposure, and it can also be caused by acoustic trauma, meaning a one-time incident...Or it can be caused by a combination." CX 2 at 8-9. In seeming contradiction to this incident, the Claimant's pure tone hearing test revealed that the Claimant's hearing in his left ear was worse than that of his right ear. CX 2 at 25. Dr. Uchmanowicz determined that, under the *Guides*, the Claimant had a 7.5% impairment in his right ear and an 11.2% impairment in his left ear. CX 1 at 2. According to Dr. Uchmanowicz, this hearing loss could have been the result of the traumatic incident, despite the fact that the Claimant heard the "pop" in his right ear, yet his hearing was supposedly worse in his left ear because "[y]ou hear from both ears." CX 2 at 26.

Dr. Uchmanowicz also tested the Claimant for tinnitus. CX 2 at 19. She testified that she performs several procedures in a tinnitus evaluation. *Id*. As part of the tinnitus evaluation, the Claimant told Dr. Uchmanowicz that the noises affected his sleep, concentration, and ability to understand the speech of other people. CX 2 at 25. The Claimant's word recognition results were 88% on the right ear and 96% on the left ear, which is considered good to excellent. CX 2 at 13. However, with background noise, his word recognition scores were poor. *Id*. Dr. Uchmanowicz added 5% impairment rating for tinnitus, but admitted that the figure was arbitrary, and that she would award the same amount for very mild and very severe cases of tinnitus. CX 2 at 29.

Overall, Dr. Uchmanowicz determined that the Claimant had a 7.5% impairment in his right ear and an 11.2% impairment in his left ear, yielding a binaural hearing impairment of 8.1% under the *Guides*. CX 1 at 2. Dr. Uchmanowicz added 5% for tinnitus, for a total hearing loss of 13% binaurally. *Id*. Dr. Uchmanowicz determined to a reasonable degree of audiological certainty that this hearing loss was causally related to his work at EBC. *Id*. Dr. Uchmanowicz also testified that there is a ±5 decibels standard deviation or margin of error in testing results. CX 2 at 32, 35. Her report indicated that the Claimant is a candidate for binaural digital amplification, "[d]ue to the type and severity of the hearing loss." CX 1 at 2.

The Claimant was also examined by Dr. Janet Sells on behalf of the Employer on June 27, 2003. Dr. Sells holds a Master of Arts Degree and a Doctorate in Audiology. RX 8 at 1. She holds a Certification of Clinical Competence from the American Speech Language and Hearing Association, and is certified by the American Academy of Audiology and the Council for Accreditation in Occupational Hearing Conservation. She is a licensed audiologist in the State of Rhode Island. RX 12 at 4. Dr. Sells has several positions as an audiologist: she works out of Atlantic Hearing and Rehabilitation, in Cranston, Rhode Island, she works at the Naval Hospital and Newport Hospital, and is the Director if the Hearing Conservation Program for employees at the naval hospital who are

exposed to hazardous noise levels. RX 12 at 1-4. Dr. Sells does not fit patients for hearing aids. RX 12 at 23.

As part of her examination, Dr. Sells reviewed the audiogram performed by Dr. Uchmanowicz, and audiograms done by EBC and Senesco. She also took a history from the Claimant, using the history obtained by Dr. Uchmanowicz supplemented by her own questions. RX 12 at 5. Dr. Sells had a complete history of the Claimant's work experience, including his employment at EBC, Point Judith Marina, Yankee Fabricators, Senesco and his final employment at EBC. RX 12 at 6. During the examination, the Claimant complained of hearing loss, difficulty hearing the television, clicking and snapping noises in his ears, and a problem in which his ears would "shut down." Id. The Claimant told Dr. Sells that he did not initially use earplugs at EBC, but did use them later on at EBC and at other employers. Id.

Dr. Sells was also able to testify as to the Claimant's prior audiograms. RX 12 at 11-12. She testified that the Claimant's pre-employment audiogram for Senesco, which occurred in 1999, showed that the Claimant had a "very slight" rateable hearing loss in the left ear and no rateable impairment in the right ear. RX 12 at 11. She acknowledged, however, that the pre-employment audiogram was "just a screening test, not a diagnostic test," and is usually performed by someone who is not an audiologist. RX 12 at 12. She testified that this type of an exam is not enough to document a rateable hearing loss definitively. RX 12 at 25. In 2001, the Claimant had another audiogram done for his pre-employment screening at EBC. Dr. Sells testified that this test also showed that the Claimant had a slight rateable hearing loss in the left but not the right ear. RX 12 at 12. However, she also explained that the test has a plus or minus 5 db range and that therefore the test result could have been 5 db above or 5 db below the results obtained and had it been 5 db below it would not have been a rateable hearing loss under the AMA Guides. RX 12 at 11-12.

Dr. Sells performed a standard audiological exam on the Claimant, including a word recognition test and a pure tone audiogram. RX 12 at 7. The Claimant performed excellently on his word recognition test, with results of 96% in the right ear and 92% in the left ear. RX 12 at 8. The pure tone audiogram revealed that the Claimant had normal hearing sensitivity that sloped to a moderate sensorineural hearing loss in both ears. RX 12 at 9. Under the AMA Guides, however, Dr. Sells did not find that the Claimant had a rateable hearing loss. *Id.* She explained that there was no rateable loss because high-frequency hearing loss, which was the type of loss the Claimant had, "does not impact on everyday communication" and therefore is not considered by the AMA Guides in rating for permanent hearing impairment. RX 12 at 30-31.

Dr. Sells also testified that hearing amplification would not be useful for the Claimant because he does not have enough hearing loss "through the speech range for a hearing aid to work." RX 12 at 17. Instead, she testified, a hearing amplification device would "just amplify high-frequency sounds which are very objectionable to people, and it would not be of any benefit for him." Id.

Dr. Sells testified that it is unlikely that the Claimant incurred additional hearing loss during his employment at EBC in 2001, providing that the Claimant was "following the appropriate procedures and using adequate hearing protection," which was mandatory. RX 12 at 13. Dr. Sells stated that with the use of hearing protection during the Claimant's short period of employment at EBC in 2001 there would be no hearing loss as studies have shown that the use of hearing protection prevents increased hearing loss. *Id*. Dr. Sells acknowledged, however, that she did not know whether the Claimant had actually worn any hearing protection. RX 12 at 27.

Dr. Sells also testified about the Claimant's tinnitus complaints, stating that they were not consistent with tinnitus because the Claimant had been putting in ear plugs to shut the sound out. RX 12 at 14. She explained that:

> [t]innitus is an internal sound that is heard within the head…if you block the ears, the sounds that you are hearing tend to become magnified or louder. To get rid of the sound…people will turn on exterior sound. What you don't want is to be in quiet. So if you put ear plugs in your ears at night to sleep…it is not an internal sound, which is the definition of tinnitus.

RX 12 at 14. Dr. Sells was able to testify to a reasonable degree of audiological certainty that the Claimant's complaints were not consistent with a diagnosis of tinnitus and she concluded that the Claimant does not have tinnitus. RX 12 at 14-15.

C. Collateral Estoppel

Before proceeding to the merits of the present matter, the Court must address whether collateral estoppel bars the Claimant from bringing this hearing loss claim under the Act because he settled claims he had against Electric Boat on October 19, 1993 and the settlement was approved by the Rhode Island Workers' Compensation Court. *See RX 9.* The Employer argues that the Claimant discharged the Employer from all liability, including liability for "other injuries" when he agreed to the State settlement and when that settlement was approved by the State of Rhode Island's Workers' Compensation Court. EB Br. at 25-28. The Employer contends that the October 2002 claim is barred by the principles of collateral estoppel and full faith and credit due to the State of Rhode Island settlement and the final court decree issued October 19, 1993. EB Br. at 26. In support of its argument, the Employer cites the Claimant's Petition for Commutation for personal injuries against Electric Boat's predecessor General Dynamics in which the Claimant states that the injuries are "knee injuries, and other injuries arising out of and in the course of his employment with Respondent, connected therewith and referable thereto." RX 9. The Petition for Commutation also states that the Claimant represents "that he did not sustain any other new, separate, different or specific injuries or disfigurement, and that he did not suffer any other physical effects resulting from the aforesaid injuries, but if he did sustain any other separate different or specific injury or disfigurement or suffer any other physical effects, he expressly includes and incorporates them in this petition." RX 9 at 2. The Employer contends that the Claimant signed a general release as part of the settlement agreement but was unable to produce any such release.

The Claimant responds that collateral estoppel does not bar the Claimant's hearing loss claim under the Longshore Act because he was not aware of a hearing loss at the time he entered into the State settlement. Cl. Br. at 3.

The Employer's contention that the general principles of collateral estoppel and full faith and credit bar the Claimant's present claim under the Act fails here. "[F]actual findings of a state court or administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals."[3] *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105, 107 (1995); *see also*

[3] Where mixed questions of law and fact are involved, collateral estoppel effect can only be given to such questions when the legal standards are the same in the two jurisdictions. *Barlow v. Western Asbestos Co.*, 20 BRBS 179, 180 (1988); *see Formoso,* 29 BRBS at 107; *Newport News Shipbldg. & Dry Dock Co. v. Dir., OWCP*, 583 F.2d 1273 (4th Cir. 1978).

Thomas v. Washington Gas Light Co., 448 U.S. 261, 281 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179, 180 (1988). However, in *Formoso* the Benefits Review Board (the "Board") also stated that "the doctrine of collateral estoppel bars only relitigation of a particular legal or factual issue that was necessarily litigated and actually decided in a previous suit." 29 BRBS at 107; *see also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966) (the principles of collateral estoppel and res judicata apply "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"); *Dixon v. John J. McMullen & Assoc., Inc.* 13 BRBS 707, 714-715 (1981).

The Employer's reliance on *Bath Iron Works v. Dir., OWCP (Acord)*, 125 F.3d 18 (1st Cir. 1997) does not assist its argument. In *Acord*, the First Circuit Court of Appeals held that a Maine Workers' Compensation Commission decision holding that the claimant's injury had no lasting effect on the claimant's condition should have been given collateral estoppel effect in a claim brought under the Longshore Act. 125 F.3d at 18, 22-23. The court there found that the administrative law judge was bound by collateral estoppel to adopt the factual findings of the Maine Agency, stating, "[T]he point of collateral estoppel is that the first determination is binding not because it is right but because it is first – and was reached after a full and fair opportunity between the parties to litigate the issue." *Id.* at 22. Unlike the claimant in *Acord*, however, the Claimant in the present matter signed a settlement agreement that was ratified by the State of Rhode Island's Workers' Compensation Court.

The present case more closely resembles *Dixon v. John J. McMullen & Assoc., Inc.*, in which the Board found that collateral estoppel did not bar the claimant from pursuing a Longshore claim because a settlement made pursuant to the Maine workers' compensation statute "merely ratified the parties' mutual agreement." 13 BRBS 707, 714-715 (1981).[4] Thus, the Board found, the matter was not actually litigated before the state commission. *Id.* at 716. Moreover, in the present case the Claimant's federal Longshore claim is for a different injury than that for which he settled his state claim in 1993. It can not be said, therefore, that any aspect of the Claimant's federal claim could have been actually litigated in the State of Rhode Island court. Following the Board's decision in *Dixon*, I find that collateral estoppel principles do not apply to the Claimant's 1993 Rhode Island settlement, in that the issues in that claim were not "necessarily litigated and actually decided." *Formoso*, 29 BRBS at 107.

D. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140, 144 (1991); *Kelaita v. Triple A Mach. Shop*, 13 BRBS

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[4] In *Arizona v. California*, the United States Supreme Court stated, "In the case of a judgment entered by confession, consent, or default, none of the issues is *actually litigated*." 530 U.S. 392, 414 (2000) (emphasis in original) (citing Restatement Second of Judgments § 27 (1982)). In addition, the Court stated that "settlements ordinarily occasion no issue preclusion . . . unless it is clear . . . that the parties intend their agreement to have such an effect." *Arizona v. California*, 530 U.S. at 414.

326, 329-330 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Indep. Stevedore Co. v. O'Leary,* 357 F.2d 812, 815 (9th Cir. 1966); *Rajotte v. Gen. Dynamics Corp.,* 18 BRBS 85, 86 (1986).

Once a claimant establishes a prima facie case, that claimant has invoked the presumption, and the burden of proof shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *See Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53, 56 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Butler v. Dist. Parking Mgmt. Co.*, 363 F. 2d 682, 683-684 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128, 129 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 129-130. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 20 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862, 865 (1st Cir. 1982).

In support of his prima facie case that his hearing loss is work-related, the Claimant testified that he had been exposed to loud noises at EBC during his employment there in 1972-1992 and in 2001.[5] TR 22. The Claimant testified on the use of hearing protection was equivocal, he testified that he did not wear hearing protection and that he did occasionally use ear plugs. Dr. Uchmanowicz testified that the Claimant had a 13% binaural hearing loss (including an 8% hearing loss binaurally plus a 5% impairment rating for tinnitus) under the *Guides*, and that this hearing loss was causally related to his work at EBC. CX 1 at 2. Viewing the testimony of the Claimant that he was exposed to loud noise at EBC and did not wear hearing protection in the light most favorable to the Claimant for purposes of determining whether the Claimant establishes a prima facie case, and considering Dr. Uchmanowicz's opinion that he has a rateable hearing loss, I find that the Claimant has presented minimal but nonetheless sufficient evidence to invoke the presumption. *Brown*, 194 F.3d at 4. The Claimant has thus established his prima facie case and successfully invoked the Section 20(a) presumption that he has a hearing loss caused by exposure to injurious noise at Electric Boat.

The burden now shifts to the Employer to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. EBC asserts that the Claimant suffers no compensable binaural hearing loss under the Act. EB Br. at 11-12. To support its assertion, the Employer relies on the medical opinion of Dr. Sells, an audiologist who found that the Claimant had no rateable hearing loss under the AMA *Guides*. RX 12 at 31. Although Dr. Sells agreed that in 2003 the Claimant had normal hearing sensitivity that sloped to a moderate sensorineural hearing loss in both ears, she testified that this type of loss was not a rateable loss under the *Guides* because the Guides are concerned with hearing capacity in the communication range and high frequency

[5] Inexplicably, the Claimant's brief did not address the issue of causation.

hearing loss does not impact upon everyday communication. RX 7 and RX 12 at 30-31. She also stated that the Claimant does not have tinnitus. RX 12 at 14-15. Furthermore, she testified that it was very unlikely that the Claimant would have incurred additional hearing loss during his short period of employment at EBC in 2001 if he was wearing hearing protection, which was mandatory at that time. RX 12 at 13.

Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the Section 20(a) presumption; rather, it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley* 34 BRBS at 41-42; *Kier* 16 BRBS at 129-130. Following this standard, I find that EBC has rebutted the Claimant's prima facie case. EBC has offered the opinion of Dr. Sells. The last audiogram taken during the Claimant's first period of employment at EBC was in 1991 and that audiogram showed no hearing loss. CX 2 at 17. Dr. Sells indicated that the 1999 Senesco audiogram showed a slight rateable hearing loss, but she explained that the audiogram was simply a screening audiogram, was not a diagnostic audiogram and, there was no evidence that it was performed by a certified audiologist. RX 12 at 12, 24-26. She notes that without additional testing to document the results of the 1999 screening audiogram it can not be determined that the findings are accurate.[6] Notably, Dr. Umchmanowicz testified that the screening audiogram taken on August 30, 1999 when the Claimant began work at Senesco did not show a hearing loss in the communication ranges and he did not have a hearing loss based upon the AMA Guides at that time. CX 2 at 16-18; RX 12 at 11-2, 25, 20-31. Thus, Dr. Sells and Dr. Umchamanowicz agree that the Claimant did not have a rateable hearing loss based upon the audiogram of August 30, 1999. Accordingly, I find that the Claimant did not have a hearing loss prior to beginning work for Senecso in August 1999 and that he suffered no hearing loss during his first period of employment at Electric Boat from 1972 to 1992.

The issue then becomes whether the Claimant was exposed to injurious noise levels during the three weeks he worked at Electric Boat in 2001 and whether he has a rateable hearing loss as a result. Dr. Sells opined that the Claimant's hearing loss is neither rateable nor related to his three week employment at EBC in 2001, as long as the Claimant was wearing mandatory hearing protection as the use of hearing protection has been shown to prevent hearing loss. I do not credit the Claimant's statement that he did not wear hearing protection during his second period of employment at EBC. First, as a new employee, EBC no doubt made the Claimant aware that hearing protection was mandatory as part of the safety instruction he received for performing his duties. Secondly, the Claimant testified inconsistently about whether he was aware of the mandatory nature of hearing protection. TR 26-27, 38. However, the Claimant admitted the Company "put emphasis on wearing your hearing protection." TR 47. Moreover, new employees seeking to make a positive impression can be expected to follow an employer's rules. Third, the Claimant testified that he wore hearing protection when supervisors were present. TR 26-27. If he did not think the hearing protection was required by EBC, then there would be no reason for him to wear hearing protection when supervisors were in the vicinity. Last, Dr. Sells testified that the Claimant told her that he wore hearing protection at EBC in 2001. RX 12 at 6. Thus, I find that the Claimant did wear hearing protection during the three weeks he was employed at EBC in 2001. Therefore, I cannot find that he was exposed to injurious noise levels during this three week period or that he has a rateable hearing loss. EBC has successfully rebutted the Claimant's prima facie case.

[6] The regulations implementing the Longshore Act indicate that audiograms provide presumptive evidence of the extent of hearing loss, if among other requirements, the audiogram was administered by a licensed or certified audiologist, or by a Board-certified otolaryngologist or by a technician under the supervision of an audiologist or physician. 20 C.F.R. 702.441 (b)(1)-(3) & (d).

Because I have found that the Employer has successfully rebutted the presumption that the Claimant has a hearing loss or that any hearing loss is work-related, the presumption no longer controls, and I must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio*, 296 U.S. at 286; *Holmes*, 29 BRBS at 20; *Sprague,* 688 F. 2d at 865. In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his or her own inferences, and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). It is solely within the discretion of the fact-finder to accept or reject all or any part of any testimony according to his or her judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969); *Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390, 395-396 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483, 486 (1978), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413, 416 (1978).

The opinions of the audiologists in this case are in dispute. Although both audiologists performed similar tests, Dr. Uchmanowicz determined that the Claimant had an 8.1% binaural hearing loss in addition to 5% additional loss for tinnitus, while Dr. Sells determined that the Claimant had neither any rateable hearing loss nor tinnitus. Therefore, I must determine which audiologist I deem to be more credible.

Although both audiologists have impressive qualifications, as both have masters and doctoral degrees in audiology, Dr. Umchamowitcz's doctorate was obtained through distance learning and she did not complete a thesis. CX 2 at 4. In contrast Dr. Sells has a doctorate from Central Michigan University and she has presented to many professional groups and has published scholarly articles. *See* RX 8; RX 12 at 1-5. Additionally, Dr. Sells had a more complete and accurate record of the Claimant's work and health history in reaching her opinions whereas, Dr. Uchmanowicz admitted that she had lost the Claimant's written history, and did not remember much of the history without those documents. CX 2 at 6. Dr. Uchmanowicz also testified that in reaching her opinions she assumed the Claimant had not worked in a noisy environment between his two periods at EBC, whereas Dr. Sells knew the Claimant's complete work history which included over a year of loud noise exposure at Senesco without the use of hearing protection during this period. *Id*.; RX 12 at 6. Lastly, Dr. Uchmanowicz admitted that Dr. Sells' report could have been accurate, as both audiograms were in within the ±5 decibel standard deviation. CX 2 at 32-33.[7] I find that Dr. Sells' opinion is the more plausible of the two.

Since I find that Dr. Sells' report was the more reliable, I credit her report over that of the Claimant's audiologist and find that the Claimant has no rateable hearing loss.[8] I also credit her finding that the Claimant does not have tinnitus.[9]

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[7] Dr. Uchmanowicz fits patients for and sells hearing aids, as reflected on her resume which indicates "increased hearing aid sales by 100%" providing a financial incentive to her determination on hearing loss. CX 3 at 5.

[8] Even if I had credited the Claimant's audiologist and found that the Claimant had an 8.1% binaural hearing loss I find that any loss occurred while the Claimant was employed at Senesco from 1999-2000. The Claimant stated that he was exposed to loud noise over the 12-month period he worked at Senesco and he did not wear hearing protection. The Claimant worked at EBC for only three weeks in 2001 part of that time in training and not production activities and I found that he did wear hearing protection during this period of time which would prevent any increase in hearing loss had a rateable loss existed prior to the beginning of his second stint at EBC. See *Port of Portland v. Dir*., 932 F.2d 836, 841 (9th 1991).

Because I have found that the Claimant has no rateable hearing loss, he is not entitled to benefits under the Act, and I need not reach any of the other issues raised in this case.[10] Accordingly, the Claimant's claim for benefits is hereby denied.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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[9] Even if I did find that the Claimant suffered from tinnitus, I would still not award him an extra 5% impairment rating as suggested by Dr. Uchmanowicz. First, the *Guides* suggest, and several courts have found that a claimant cannot receive benefits for tinnitus in the absence of an underlying hearing loss. The *Guides* state: "**Tinnitus** in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5% for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living." *Guides*, Fifth Edition, §11.2a, at 246. *See Archambault v. Elec. Boat Corp*., 2002-LHC-2182 ("one must have unilateral or bilateral hearing impairment before one adds 5% for tinnitus."); *Norvish v. Elec. Boat Corp*., 2002-LHC-1968 ("a claimant may only be awarded benefits for tinnitus when it is shown that a rateable hearing impairment existed in addition to tinnitus.").

Additionally, the mere presence of tinnitus does not entitle a claimant to an automatic 5% impairment rating. The *Guides* state that the physician is to "add *up to* 5% for tinnitus." *Id*. (emphasis added). Thus, the Claimant must provide a rationale for determining the appropriate percentage of additional impairment rating between within the range of 0-5%, such as showing that the presence of tinnitus impacts his speech discrimination or other activities of daily living. *See Voccio v. Elec. Boat Corp.*, 2002-LHC-2247 ("the AMA Guides contemplate application of informed judgment by the physician to select a value in this range, and the basis for that judgment should be explained."); *Archambault v. Elec. Boat Corp*., 2002-LHC-2182 ("it is insufficient, analytically, to assign any value in a range without a basis."); *Norvish v. Elec. Boat Corp*., 2002-LHC-1968 ("a tinnitus severity rating assignment would not be considered arbitrary if it is supported by the evidence, based on the informed judgment of the physician, and a sufficient rationale is provided for the physician's selection of a value in the range."). Thus, absent a reasoned explanation for assessing the maximum value of 5%, the assignment of 5% is arbitrary. In her deposition, Dr. Uchmanowicz admits as much; she stated that the figure is arbitrary, and that she would award a 5% impairment rating for both mild and moderate cases of tinnitus. CX 2 at 29. Thus, I cannot award the Claimant a 5% impairment rating for tinnitus based on Dr. Uchmanowicz's testimony.

[10] The Claimant's attorney submitted an application for attorney fees on April 22, 2004. In light of my decision dismissing the claim, the Claimant's attorney is not entitled to a fee award.